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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 817

ARTHUR CUDMORE, Secretary, Auth-Loffler, Inc.,
Petitioner,

v.

CHESTER BOWLES, Administrator, Office of Price Administration.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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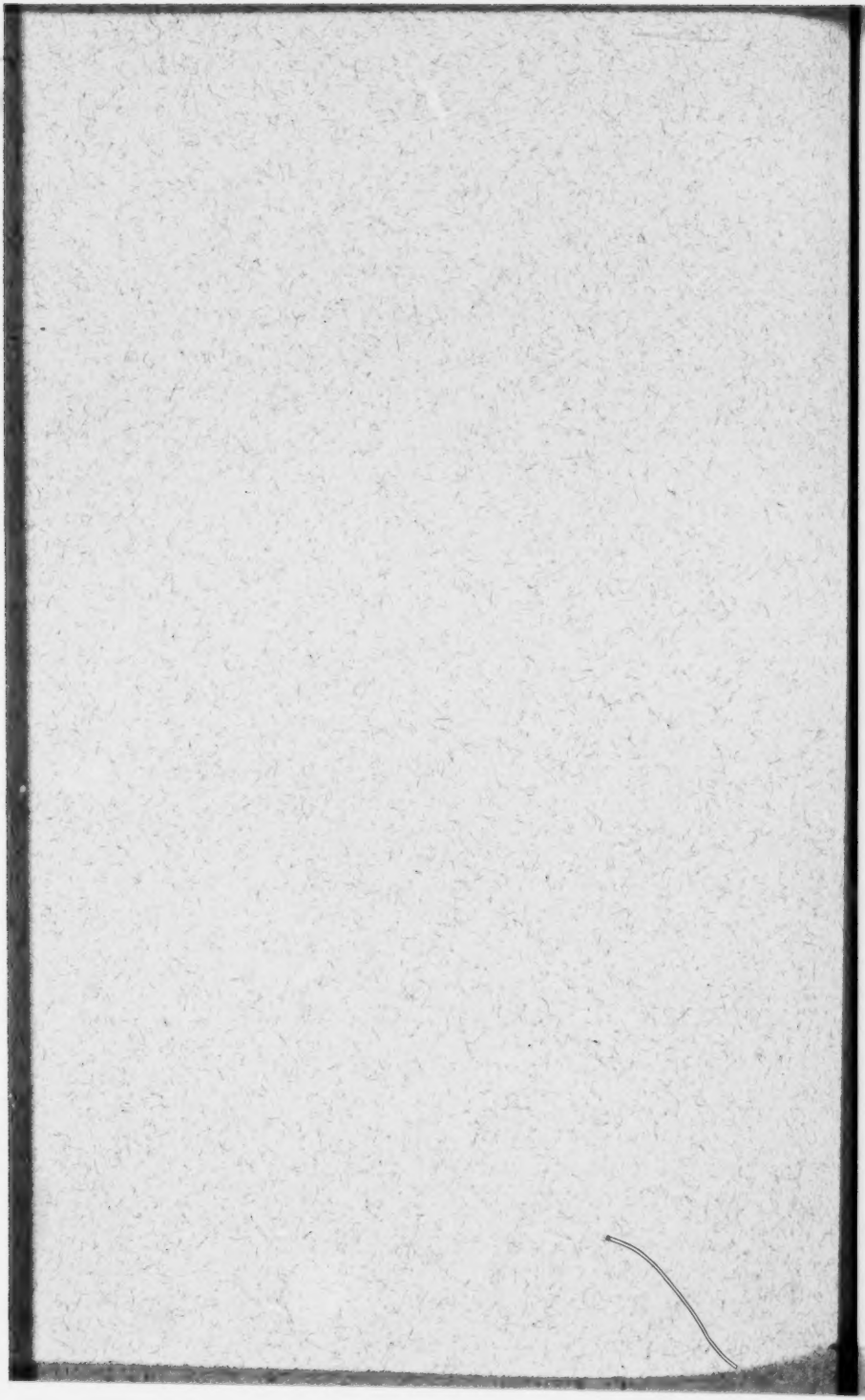

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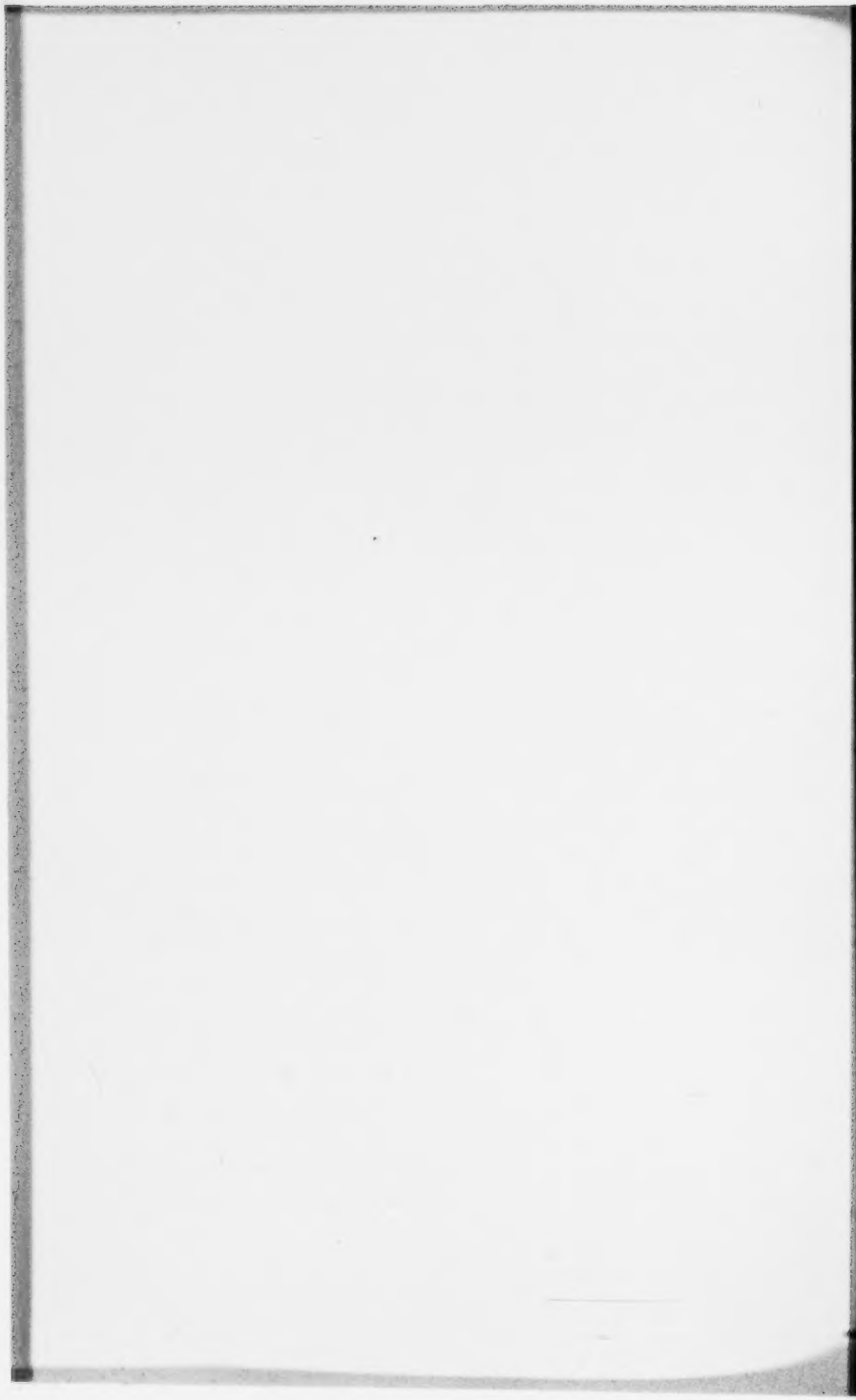

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No. .....

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v.

CHESTER BOWLES, Administrator, Office of Price Administration.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Arthur Cudmore, Secretary, Auth-Loffler, Inc., by his attorneys, prays that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia to review a final judgment of that Court entered in the above-entitled cause on November 6, 1944, affirming a final judgment of the District Court of the United States for the District of Columbia, entered on March 10, 1944 (R. 21).

Opinions Below.

The only opinions of Courts below were the following:

(1) The District Court wrote no opinion; its only findings of fact and conclusions of law are embodied in the final judgment from which the appeal was taken (R. 12, 13).

(2) The opinion of the United States Court of Appeals for the District of Columbia (R. 18-20), 79 App. D. C. ..; 144 Fed. (2d) .... (Adv. Sheets).

Statement of Matter Involved.

Arthur Cudmore, the petitioner herein, is secretary of Auth-Loffler, Inc., a corporation organized under the laws of Delaware, and engaged in business in the District of Columbia, as wholesale dealers in meats and meat products of various kinds. The petitioner was sued in his capacity as secretary of the said corporation, by Chester Bowles, Administrator, Office of Price Administration, in the District Court of the United States for the District of Columbia, in a complaint denominated an "Application for an Order," etc., which prayed the Court for an order requiring your petitioner (as the respondent in the trial Court) to produce before one Carl W. Berueffy, Enforcement Attorney for the Office of Price Administration, certain invoices, hereinafter described, and for which an administrative subpoena duces tecum had previously been served upon your petitioner, and which was not complied with by him (R. 2-4).

The complaint alleged (R. 3) that prior to January 29, 1944, the Administrator for the Office of Price Administration had "deemed that an investigation to determine whether" your petitioner's corporation, its agents and employees "had or had not complied with the provisions" of the Emergency Price Control Act of 1942 and, regulations thereunder, was proper, to assist him in the administration and enforcement of the Act and regulations and orders thereunder. That, as a result of said determination, one

George L. Thomas, an investigator for the Office of Price Administration, was assigned and directed to make such investigation; that this investigator had called at the office of petitioner's corporation, presented his credentials to your petitioner, and requested permission to inspect all invoices kept by the said corporation showing:

A. Sales of pork and pork products by Auth-Loffler, Inc., from July 1, 1943, to October 30, 1943.

B. Purchases of pork and pork products by Auth-Loffler, Inc., from July 1, 1943, to October 30, 1943.

The complaint further alleged that the invoices requested to be inspected were records which the said corporation was required by law to keep, and that the petitioner had refused to permit such inspection. That following this, the said administrator for the Office of Price Administration had issued a subpoena duces tecum, directing the petitioner to appear and testify and to produce the said documents before the said Carl Berueffy, an Enforcement Attorney of the Office of Price Administration, at 5601 Connecticut Avenue, Northwest, Washington, D. C., on February 10, 1944, at 10:00 o'clock A. M., and that personal service of this subpoena was made upon the petitioner on February 9, 1944 (R. 3-4). The petition also alleged that all of the documents called for by the subpoena "were at the time of issuance of the subpoena deemed by applicant to be relevant and material to the investigation undertaken by him and the said investigator"; and that your petitioner did not and had not produced any of the documents called for by the said subpoena (R. 4).

The petitioner, as the respondent in the District Court, answered the complaint (R. 9-11), and, admitted that the subpoena duces tecum was served upon him on the day before the return date thereof. The answer further alleged that compliance with the requirements of the subpoena duces tecum was impossible, in that it was served upon him on February 9, 1944, and required the production of a num-

ber of invoices estimated at twenty thousand at 10:00 o'clock the following morning; that while the subpoena called for the production of invoices of sales and purchases of pork and pork products by your petitioner's corporation, this corporation also purchased and sold meat and meat products other than pork, and that sales and purchases of meat and meat products were billed and invoiced without segregation (R. 10). The answer estimated that it would require the labor of one clerk working eight hours a day several weeks to segregate the invoices of sales and purchases of pork and pork products from sales and purchases of meat and meat products generally (R. 10, 11).

The Administrator of the Office of Price Administration, as plaintiff in the District Court, filed a motion along with his complaint, in which motion he prayed the Court to enter an order requiring your petitioner (as the respondent) to comply with the subpoena duces tecum hereinebfore referred to, on such day and at such time and place as the Court might direct (R. 6, 7). The petitioner, as respondent in the District Court, moved to dismiss the complaint, simultaneously with the filing of his answer, on the ground that the complaint did not state a claim upon which relief could be granted (R. 9). The petitioner also filed in the District Court, along with his answer and motion to dismiss, his own affidavit in which he averred under oath the salient facts contained in his answer, hereinbefore set forth, and particularly averred that according to his knowledge, information and belief, it would require a clerk at least a month working full time to segregate the invoices as required by the subpoena (R. 7, 8).

By consent of counsel for both parties, the hearing of the plaintiff's motion therein for the order requiring your petitioner to comply with the subpoena and your petitioner's motion, as defendant in that Court, to dismiss the complaint were considered by the District Court as a final hearing of the cause; no evidence was offered and the case was argued and considered, upon the pleadings and affidavits appearing in the record (Affidavit of George H.

Thomas, R. 6; affidavit of Arthur Cudmore, R. 7, 8); and it being admitted that the petitioner (defendant in that cause) had refused to produce the invoices called for by the subpoena, the Court entered its final judgment on March 10, 1944 (R. 12, 13), as follows:

(1) Denying defendant's motion to dismiss the complaint.

(2) Directing your petitioner (the defendant) to permit "the inspection and copying" of all of the records which had been called for by the subpoena by a duly accredited representative of the Office of Price Administration, commencing on March 13, 1944, during the ordinary business hours of the day at the place of business where the records are kept and to continue for such length of time as may be reasonably necessary to complete such inspection and copying.

(3) Provided, that if the defendant (the petitioner herein) should give notice in writing before 10 o'clock A. M. on March 13, 1944 (three days from the entry of the judgment) that he preferred to produce the documents at the offices of the administrator of Office of Price Administration in the District of Columbia, and would produce them by April 13, 1944, then your petitioner was

"Ordered to produce the documents above-described at the District of Columbia Office of Price Administration, 5601 Connecticut Avenue, N. W., on or before April 13, 1944".

The petitioner, as defendant in the District Court, appealed from this judgment to the United States Court of Appeals for the District of Columbia, which Court, after argument and consideration of the case, affirmed the judgment of the District Court on November 6, 1944.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, which provides for the granting of the

Writ of Certiorari where the United States Court of Appeals for the District of Columbia

> "has decided a question of general importance or a question of substance relating to the construction or application of the Constitution, or a treaty or statute, of the United States, which has not been, but should be, settled by this court; or where that court has not given proper effect to an applicable decision of this court."

The matter of whether a compulsory inspection of corporate records can be had, through the medium of an administrative subpoena duces tecum or otherwise, for the purpose of determining whether the particular corporation, its agents or employees, have or have not violated the law, where no charge of any such violation of law has been made or suggested, is a constitutional question of general importance, involving the 4th and 5th Amendments to the Constitution; it is a question of substance, whether, under the Emergency Price Control Act of 1942 and the regulations thereunder, a corporation, or the custodian of its records, can be required to permit such corporate records to be inspected and copied on the corporate premises, or else required to produce the same for inspection and copying, irrespective of the burden of labor and expense to the corporation or custodian of its records, involved in such procedure, and regardless of the fact that no proceeding is pending against the said corporation, its agents, or employees, and no charges have been made against it or them.

Questions Presented.

(1) Is not the right of inspection of records and documents given the Administrator of the Office of Price Administration under the Emergency Price Control Act of 1942, and the Administrator's right to require the production of documents under the said Act, required to be exercised reasonably?

(2) In the light of the uncontroverted proof afforded by defendant's affidavit (R. 7, 8) that it would require the labor of a clerk working full time the estimated period of one month to segregate the invoices required by the judgment of the District Court to be produced in a period of 33 days, or else permitted to be inspected and copied by a representative of the Office of Price Administration at the place of business where such records were kept, was not both the subpoena duces tecum on which the complaint was based and the judgment of the District Court, in effect enforcing the said subpoena, unreasonable and void?

(3) Did not the District Court err in denying defendant's motion to dismiss the complaint on the ground that it did not state a claim upon which relief could be granted?

(4) Did not the District Court err in granting the affirmative relief to the plaintiff awarded in its final judgment of March 10, 1944?

(5) Did not such a far-reaching and oppressive order, as was contained in the judgment entered in the District Court, amount to an unlawful search and seizure, as contemplated by the 4th Amendment to the Constitution? Did it not violate defendant's privileges under the 5th Amendment, as one of the expressed purposes of the inspection of the records called for was to see whether the defendant in the District Court (the petitioner herein), as an employee of Auth-Loffler, Inc., had violated any of the provisions of the Emergency Price Control Act of 1942, or the regulation made thereunder? Did it not require the defendant (the petitioner herein) to perform labor to the extent indicated in his affidavit (R. 7, 8), or else to provide office facilities to the Administrator of the Office of Price Administration, without providing compensation for such labor or office facilities, in violation of the 5th Amendment?

(6) Did not the United States Court of Appeals for the District of Columbia commit error in affirming the judgment of the District Court of the United States for the said District?

Reasons Relied on for Allowance of Writ.

The matter of the extent to which the Administrator of the Office of Price Administration may go in discharging the functions of his office, by way of compelling the production of private business records, without regard to the burdens imposed by such production and inspection, and solely for the purpose of seeking to ascertain whether the Emergency Rent Control Act of 1942, or any regulation thereunder has been violated by the owner of such records, its agents, or employees, is a question of general importance, which this Court should determine.

It is respectfully urged by the petitioner that in view of all the circumstances, the judgment of the District Court was erroneous, in that

(a) The requirement that the petitioner produce the records called for by the subpoena duces tecum, or else to permit the same to be inspected and copied, at the place of business of your petitioner's corporation where the same were kept was so far-reaching and oppressive as to cause the same to be unreasonable and void.

(b) It violated the rights of the defendant (this petitioner) under the Constitution of the United States, in that it amounted to an unlawful search and seizure under the 4th Amendment; it sought to require the defendant (this petitioner) to provide evidence against himself in a possible criminal case in violation of his rights under the 5th Amendment; it tended to deprive him of property (the expenditure of a large amount of labor, or, perhaps the furnishing of office space for the inspection, segregation, and copying of the large number of records referred to herein), without compensation therefor, in violation of the rights of the defendant (this petitioner), under the 5th Amendment.

(c) The judgment was erroneous, because the records required to be produced and allowed to be copied did not relate to any pending case or complaint against either this petitioner or his corporation.

WHEREFORE, your petitioner prays that this Court may issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia, directing it to certify and send to this Court a full and complete transcript of the record therein, to the end that the cause may be reviewed and determined by this Court as provided by law, that the judgment may be reversed with costs, and for such other and further relief as may be appropriate.

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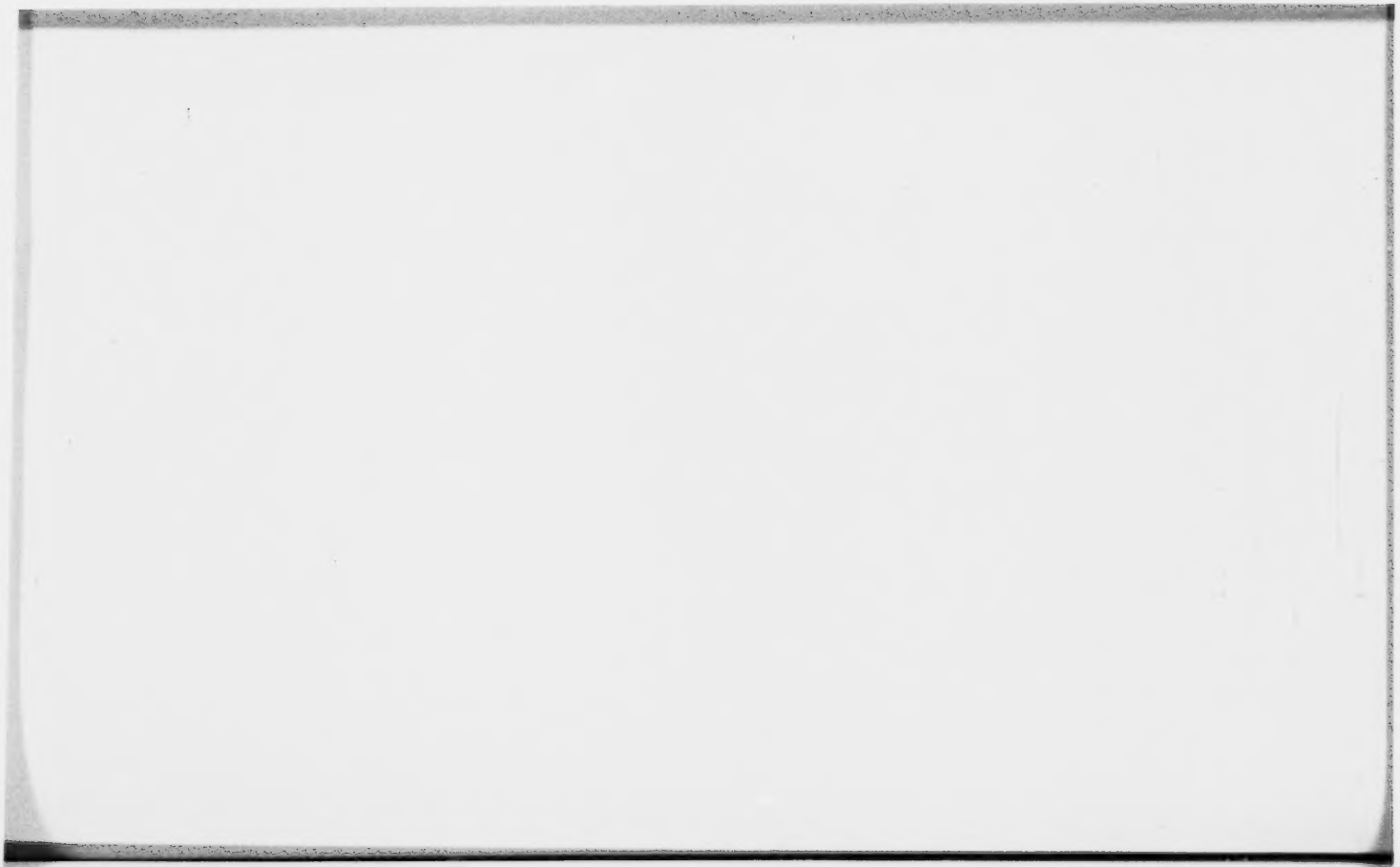

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No.....

Arthur Cudmore, Secretary, Auth-Loffler, Inc., *Petitioner*,

v.

Chester Bowles, Administrator,
Office of Price Administration.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the United States Court of Appeals for the District of Columbia in the above-entitled cause will be found in 79 App. D. C. ....; 144 Fed. (2d) .... (Advance Sheets) (R. 18-20).

JURISDICTION.

The petitioner claims that he is entitled to have the opinion and judgment of the United States Court of Appeals for the District of Columbia reviewed by virtue of Section 237 (b) of the Judicial Code as amended, for the following reasons:

1. That the said Court has decided a question of general importance, and likewise of substance relating to the con-

struction or application of the Constitution of the United States and to the construction and application of a statute of the United States.

2. The said Court erroneously sustained a judgment of the District Court of the United States for the District of Columbia, which judgment deprived the petitioner herein of his rights and privileges under the 4th and 5th Amendments to the Constitution of the United States, in that the said judgment, if executed, would amount to an (a) unreasonable search and seizure; (b) to compelling the petitioner to be a witness against himself in a possible criminal case; (c) to a deprivation to the petitioner of his property without due process of law, in that the said judgment required the petitioner either to devote a large amount of labor to the compliance with its provisions or else to provide a place in which the Administrator of the Office of Price Administration might have such labor carried on by his own representatives, no provision for compensation to the petitioner having been made.

SPECIFICATIONS OF ERROR TO BE URGED.

1. That the District Court of the United States for the District of Columbia erred in entering the judgment which was thereafter affirmed by the United States Court of Appeals for the District of Columbia, because the subpoena duces tecum on which the suit was based was impossible of being complied with.

2. That the judgment sought to be reviewed herein deprived the defendant of his rights and privileges under the 4th and 5th Amendments to the Constitution of the United States, in that, (a) it constituted an unreasonable search and seizure; (b) it required the defendant to give evidence against himself in such a way that such evidence might be used against the petitioner, in the event that a criminal prosecution should be based in information obtained through the examination of the records required to be ex-

hibited by the petitioner; (c) it required the petitioner either to perform substantial labor without compensation therefor or else to provide the Administrator of the Office of Price Administration, or his representative, with office space in which to make the extensive and continuing examination of records contemplated by the said judgment, without compensation to the petitioner.

3. The judgment appealed from was so far-reaching and oppressive in its scope, and so disproportionate to the end sought to be attained thereby, that the same was unreasonable and improper to be entered.

4. It was error to order the production or the inspection and copying of the records referred to in the judgment, to enable the Administrator to determine whether the petitioner had or had not violated the Emergency Price Control Act of 1942, or any regulation thereunder, in the absence of any pending case against the petitioner or his corporation, of charges having been preferred against him or them, or of probable cause for believing that there had been some violation of the Emergency Price Control Act by one or both of them.

5. The United States Court of Appeals for the District of Columbia erred in affirming the judgment of the lower Court.

SUMMARY OF ARGUMENT.

1. The right of the Administrator of the Office of Price Administration to require the production and permission to inspect the records called for in this case was not exercised within constitutional limitations.

2. The demand for the production of documents made in the subpoena duces tecum on which the complaint in this cause was based was unreasonable in that it was so far-reaching in its scope that to attempt to comply therewith would have been unduly burdensome and oppressive upon the petitioner (defendant). The effect of the judgment

was to compel the production or the inspection of the very same documents called for by the subpoena, whether relevant or irrelevant as evidence to any contemplated issue. Since the burden of complying with the requirements of this judgment was so disproportionate to the end sought to be attained thereby, the execution of the judgment would constitute an unreasonable search and seizure under the 4th Amendment to the Constitution of the United States.

3. There was no proceeding of any kind pending against the petitioner at the time when the production and inspection of the documents was demanded of him, and it does not appear that any charges of a violation of the Emergency Price Control Act of 1942, or any regulation thereunder, had been made against the petitioner or his corporation. The demand was for all invoices of certain classes during a four months period, without a showing of relevancy or evidentiary value of any particular invoices included in the estimated 20,000 which were called for. The inspection required by this judgment was merely exploratory, for the purpose of seeking to discover whether the petitioner or his corporation had or had not violated a statute or regulation based thereon. The judgment, therefore, violated the petitioner's constitutional rights.

4. The requirement of the judgment to the effect that the petitioner (the defendant in the lower Court) permit the inspection and copying of the records and documents specified in the said judgment by a duly accredited representative of the Office of Price Administration was to demand that he furnish evidence which could be used against him in any criminal case which might be based on the result of the inspection of such documents, in violation of the petitioner's rights and privileges under the 5th Amendment to the Constitution of the United States.

5. The uncontradicted affidavit of the petitioner informed the Court that it would require the estimated period of at least a month for a clerk working full time to segregate the

documents called for by the subpoena and directed by the Court's judgment to be produced by the petitioner, or permitted to be examined and copied. This, the petitioner contends, likewise violated his rights and privileges under the 5th Amendment to the Constitution of the United States, in that it was tantamount to depriving the petitioner of property without due process of law, since no provision was made in the judgment for compensation to him for the labor involved, if he segregated the records and produced them himself, or for providing office facilities to the representative of the Administrator of the Office of Price Administration, who, alternatively, was authorized by the judgment to inspect and copy the said records, if the petitioner did not elect to produce them.

ARGUMENT.

1.

The Demand for the Production of Documents was Unreasonable.

The judgment required the production, or the inspection and copying of the following:

> "All invoices kept by Auth-Loffler, Inc., showing (a) sales of pork and pork products by Auth-Loffler, Inc., from July 1, 1943, to October 30, 1943; (b) purchases of pork and pork products by Auth-Loffler, Inc., from July 1, 1943, to October 30, 1943."

It was shown by the verified answer of the petitioner (defendant in the lower Court) and by his affidavit, neither of which was contradicted, that the number of these invoices was estimated to be 20,000, during the period to which the demand related. While the judgment referred only to invoices of purchases and sales of pork and pork products by Auth-Loffler, Inc., this corporation engaged in the purchase and sale of meats and meat products other than pork and pork products, and invoices of purchases and sales of

meat and meat products other than pork and pork products were all filed, unsegregated, with the invoices which were the subject matter of the judgment; it was shown that thousands of invoices related not only to pork and pork products but to other meat products as well; and it was shown that according to the petitioner's best knowledge, information, and belief, it would require several weeks, or at least a month for a clerk working full time to segregate invoices of pork and pork products from other invoices. The subpoena duces tecum, which was the basis of the complaint in the lower Court, as the result of the same not having been complied with, was served the day before the documents called for therein were required to be produced; and while the Court's order allowed a period of 33 days for the production of these documents, if the defendant elected to produce them instead of permitting the inspection and copying, as was alternatively provided for in the judgment, the judgment, nevertheless, was oppressive in that the major portion of the working time of the defendant, or of one clerk working for the estimated period of several weeks, or a month, would be consumed in complying therewith, if the defendant's undisputed estimate of the length of time involved for compliance with the demand is assumed to be correct. It is respectfully suggested that the demand for the production or the inspection and copying of the records in this case, as contained in the judgment appealed from, is grossly disproportionate to any need therefor or end sought to be attained. There is no contention made that some complaint of a violation of the Price Control Act, or regulation thereunder, had been preferred against the petitioner or his corporation, at the time when the records were demanded; in fact, the very language of the complaint on which the judgment was based suggests otherwise, in that the purpose of demanding the production of these invoices was declared in the complaint to be to determine whether Auth-Loffler, Inc., its agents, and employees had or had not complied with the provisions of the said Act and

regulations, thereunder, and to assist the Administrator in the enforcement of the Act and regulations (R. 3). Certainly this alleged reason does not justify the entry of such a judgment as was entered in the lower Court.

2.

The Judgment of the Court Below Violated the 4th and 5th Amendments to the Constitution.

That which the Administrator of the Office of Price Administration sought to accomplish in this case and which was required to be done by the judgment appealed from was, in essence, the same thing which was disapproved by this Court in the case of *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298, 68th L. ed. 696, wherein the Court said:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all of our traditions into the fire, and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the commission's wholesale demand would cause, are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up * * *. The right of access given by the statute is to documentary evidence,—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer. We assume that the rule to be applied

here is more liberal but still a ground must be laid, and the ground and the demand must be reasonable.

Federal Trade Commission v. *American Tobacco Company*, 264 U. S. 298, 68 L. ed. 696.

Certainly, no ground was alleged in the complaint or shown to the Court for supposing that the invoices called for contained evidence pertinent to any legal proceeding or investigation either under way or contemplated, so that it would seem that the cited case (*Federal Trade Commission* v. *American Tobacco Company*, 264, U. S. 298, 68th L. ed. 696) should be controlling.

In the case of *Hale* v. *Henkel*, 201 U. S. 43, 50 L. ed. 652, a coporation was charged with a violation of the anti-trust law, and, in connection therewith, a subpoena duces tecum directed a witness to produce all understandings, contracts, and correspondence, between a corporation named and six different companies, as well as all reports made and accounts rendered by them, from the date of the organization of the corporation, and all letters received by the corporation since its organization from a number of companies. The Court, in commenting on this, said:

"We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the 4th Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena duces tecum, against which the person, be he individual or corporation, is entitled to protection. Applying the test of reasonableness to the present case, we think the subpoena duces tecum is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts, or correspondence between the MacAndrews & Forbes

> Company and no less than six different companies * * *."

Hale v. *Henkel*, 201 U. S. 43, 50 L. ed. 652.

In *Boyd v. U. S.*, 116 U. S., 616, 29 L. ed., 746, an information was filed in the United States District for the Southern District of New York, having for its purpose the forfeiture of certain goods that were alleged to have been fraudently imported without the payment of duties thereon. At the trial it became important to show the quantity and value of certain glass contained in twenty-nine cases previously imported by the defendant. To do this, the District Attorney offered in evidence an order which had previously been made by the Judge of the District Court directing that notice under seal of the Court be given to the claimants requiring them to produce the invoices of these twenty-nine cases. The claimants, in obedience to the notice, but objecting to its validity and to the constitutionality of the law, produced the invoices; and since it was offered in evidence by the District Attorney, they objected to its reception, on the ground that in a suit for a forfeiture no evidence could be compelled from the claimants themselves, and also that the statute insofar as it compelled production of evidence to be used against the claimants, was unconstitutional and void. The Act under which the proceeding was brought and under which the order was entered provided that:

> "In all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the Government, whenever in his belief any business book, invoice or paper belonging to or under the control of the defendant or claimant will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion issue a notice to the defendant or claimant to produce such book, invoice or paper in court, at a day and hour to be specified in

said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States Marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid."

The Court held that both the 4th and 5th Amendments to the Constitution were violated by the statute. In commenting on he same the Court in its opinion said:

"It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution in all cases where a search and seizure would be; * * *.

"We have already noticed the intimate relation between the two amendments (4th and 5th). They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is a 'criminal search and seizure' within the meaning of the Fourth Amendment. And we have been

unable to perceive that the seizures of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

The Court said:

"We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the District attorney of said invoice, when produced in obedience to said notice, and submission in evidence by the Court, were erroneous and unconstitutional proceedings."

Boyd v. *U. S.*, 116 U. S. 616, 29 L. ed. 746.

The test of whether an order for the production of documents constitutes an unreasonable search in violation of the 4th Amendment is clearly stated in the opinion of the Court in *McMann* v. *Securities and Exchange Commission* (1937), 87 F. (2d), 377. While in that case the Court sustained the validity of an order for the production of documents, it stated thus:

"No doubt a subpoena may be so onerous as to constitute an unreasonable search. * * * The search is 'unreasonable' only because it is out of proportion to the end sought, as when the person served is required to fetch all his books at once to an exploratory investigation whose purposes and limits can be determined only as it proceeds. The investigation at bar was no such fishing excursion; it was limited to transactions in two companies as to which the commission had some evidence of violations of the statute. The documents demanded were few and their production did not interfere with the business of Engell and Company."

McMann v. *Securities and Exchange Commission*, 87 F. (2d) 377.

Measured by the standard laid down in the last cited case (*McMann* v. *Securities and Exchange Commission*, *supra*), the subpoena duces tecum and the requirements of the judg-

ment appealed from in the case at bar constituted an unreasonable search, in that the documents called for were estimated at twenty thousand in number; the scope of the call was out of all proportion to the end sought; the documents called for were to be used in a contemplated exploratory investigation, the purposes and limits of which to be determined only as such exploratory investigation progressed; the proposed investigation was precisely the sort which was designated in the last cited case as a "fishing excursion."

3.

The Judgment was Erroneous Because It Required the Production of Too Many Documents in Too Short a Time.

The judgment required the defendant in the lower Court (the petitioner herein), either to permit the inspection and copying of the vast number of invoices hereinbefore specified, by a representative of the plaintiff's office at the place of business where such records were kept during the ordinary business hours of the day, or else to produce the documents on or before the 33rd day after the entry of such judgment. To comply with this judgment would have required, and would still require the defendant, against whom the judgment was directed, either to labor for the large number of hours and days which the record shows a compliance with the judgment would require without compensation being provided therefor, or else, to employ a clerk to do the same thing, with no provision for defendant's reimbursement; or, otherwise, compliance would require the defendant to furnish, without compensation therefor, office space or facilities, for the inspection and copying of the said records by the plaintiff, thus depriving the defendant of property without due process of law.

4.

No Charge of Violation of Law or Regulation was Pending Against the Defendant in the Lower Court, or Against His Corporation When the Judgment was Entered.

An examination of the leading cases wherein similar issues have been presented to this Court discloses that the demand for the production or inspection of records is usually made in connection with some criminal action, civil suit, or administrative investigation. Thus, in *Brown* v. *U. S.*, 276 U. S., 134, 72 L. ed. 500; *Wheeler* v. *U. S.*, 226 U. S., 478, 57 L. ed. 309; *Consolidated Rendering Company* v. *Vermont*, 207 U. S. 541, 52 L. ed. 327, the subpoena duces tecum, in each case, called for the production of documents before a Grand Jury. In *Nelson* v. *U. S.*, 201 U. S. 92, 50 L. ed., 673, the subpoena required the production of documents before a Special Master, in a pending suit which had been brought by the United States. But in the case at bar the primary purpose of the inspection of the records is the inspection. It is not claimed that the contents of the invoices referred to in this case are evidence or are believed to be evidence in any pending proceeding. Therefore, the investigation seems to fall within the category condemned in the case of *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298, 68th L. ed. 696, hereinbefore cited.

CONCLUSION.

In conclusion, it is respectfully submitted that this Court should grant a Writ of Certiorari to the end that the aforementioned judgment entered in this cause against your petitioner, in the United States Court of Appeals for the District of Columbia, may be reviewed and reversed by this Court.

Respectfully submitted,

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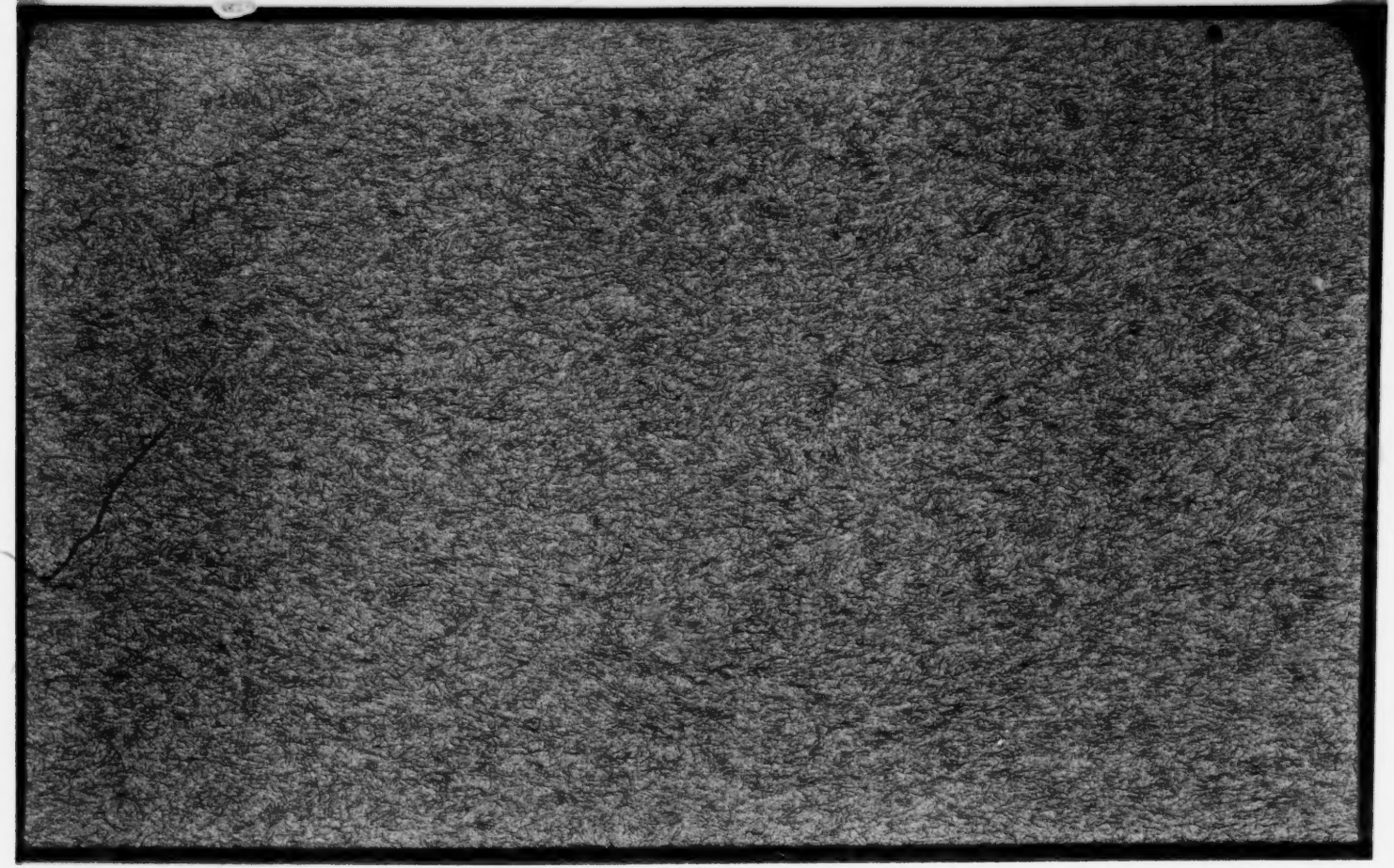
No. 817

In the Supreme Court of the United States

October Term, 1914



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627901—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 817

ARTHUR CUDMORE, SECRETARY, AUTH-LOFFLER, INC., PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

No opinion was filed by the district court. The opinion of the United States Court of Appeals for the District of Columbia (R. 18–20) is not yet officially reported.

JURISDICTION

The judgment of the United States Court of Appeals was entered on November 6, 1944. The petition for a writ of certiorari was filed in this Court on January 5, 1945. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATUTE INVOLVED

The case involves the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. App., Supp. III, 901 *et seq.*, as amended by the Act of October 2, 1942, 56 Stat. 765, 50 U. S. C. App., Supp. III, Sec. 961. The pertinent provisions of the Act are as follows:

> Sec. 202 (a). The Administrator is authorized to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.
>
> (b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

* * * * *

(e) In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

QUESTIONS PRESENTED

Whether an order enforcing obedience to a subpoena issued by the Price Administrator under the Emergency Price Control Act of 1942 violates the constitutional privilege against self-incrimination or the constitutional guarantee against unreasonable searches and seizures if it (1) calls for the production of specifically de-

scribed corporate records which are pertinent to a proper inquiry undertaken in pursuance of statutory authority and which cover a period of four months and (2) allows for the production thereof the full time which the person to whom it is directed claims will be required to segregate such records.

STATEMENT

Petitioner, Arthur Cudmore, is the Secretary-Treasurer of Auth-Loffler, Inc., a Delaware corporation engaged in the business of selling meats at wholesale in the District of Columbia (R. 2, 9–10). The corporation at all material times has been subject to Maximum Price Regulation No. 148 (7 F. R. 8609), issued under Section 2 (a) of the Emergency Price Control Act of 1942, prescribing the maximum prices at which dressed hogs and wholesale pork cuts may be sold or purchased in the course of trade or business at wholesale. As used in the regulation, the term wholesale pork cuts includes pork and pork products (Sec. 1364.35).

The Price Administrator having determined that an investigation was proper to ascertain whether the corporation was complying with the Act and regulation, an investigator of the Office of Price Administration pursuant to instruction called at the corporation's place of business and requested permission to inspect all invoices kept by the corporation showing all sales and pur-

chases of pork and pork products by the corporation from July 1, 1943, to October 30, 1943 (R. 3). Permission to inspect these records was refused (R. 3). Thereupon, the Price Administrator, in accordance with the provisions of Section 202 (e) of the Act, issued a subpoena directing the petitioner as the custodian of the corporation's records to appear and produce before an enforcement attorney of the Office of Price Administration all invoices kept by the corporation showing all purchases and sales of pork and pork products by the corporation during the period from July 1, 1943, to October 30, 1943 (R. 3, 5). The petitioner having failed to comply with the subpoena (R. 4, 12), the Price Administrator brought a proceeding in the district court under Section 202 (e) of the Act to compel compliance therewith (R. 2). After a hearing, the court issued a final judgment requiring the petitioner either to permit the invoices to be inspected by investigators of the Office of Price Administration at the corporation's place of business, or, at his election, to produce them within a period of one month at the office of the Office of Price Administration (R. 12–13). The United States Court of Appeals for the District of Columbia affirmed the judgment.

ARGUMENT

The decision which petitioner seeks to have reviewed is in harmony with the decisions of this Court and is not in conflict with the decision of any

other circuit court of appeals. No question is presented which has not already been decided by this Court.

That it is within the limits of Congressional authority to empower an administrative officer or agency to issue subpoenas calling for the production of evidence and provide for the enforcement thereof by judicial proceedings, is now too well established to admit of doubt. *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 510. The power thus delegated to an administrative officer or agency must, it is true, be exercised so as not to violate the constitutional privilege against self-incrimination or the constitutional guaranty against unreasonable searches and seizures. *Federal Trade Com'n* v. *American Tobacco Co.,* 264 U. S. 298; *Hale* v. *Henkel,* 201 U. S. 43; *Boyd* v. *United States,* 116 U. S. 616. But the order which the court below affirmed and which petitioner seeks to have reviewed violates neither of these constitutional rights.

1. The privilege against self-incrimination is a purely personal one. It cannot be invoked by or on behalf of a corporation, or by a corporate officer to resist the compulsory production of corporate records, even though they may tend to incriminate him personally. *United States* v. *White,* 322 U. S. 694, 699. The order here assailed called only for the production of corporate records, and plainly does not infringe any privi-

lege to which petitioner can lawfully claim to be entitled.

2. Nor can the order be challenged on the ground that it violates the constitutional guaranty against unreasonable searches and seizures. It calls only for the production of records clearly relevant to an inquiry or investigation which the Administrator has lawfully undertaken in pursuance of authority conferred on him by an Act of Congress and specifically describes the records to be produced—invoices covering the purchase and sale of pork during a period of only four months. This Court has repeatedly held that a subpoena thus limited does not violate the constitutional prohibition against unreasonable searches and seizures. *Brown* v. *United States*, 276 U. S. 134; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541; *Wheeler* v. *United States*, 226 U. S. 478. That the order calls for a large number of documents or may cause petitioner considerable expense is not enough to stamp it as unreasonable. Compare *Wheeler* v. *United States*, 226 U. S. 478; *Nelson* v. *United States*, 201 U. S. 92; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 554. Nor can it be said to be unreasonable in respect of the time which it allowed for the production of the records. It allowed the full time which petitioner claimed would be required to assemble the records, and as the court below observed, there is no suggestion that a request for additional time would not have received sympa-

thetic consideration. (R. 20.) Cf. *Hale* v. *Henkel,* 201 U. S. 43, 70.

3. The subpoena which the order enforced was issued in connection with an investigation which the Administrator had undertaken to determine whether the corporation of which petitioner is the secretary was complying with the Act and the applicable maximum price regulation. Both the inspection and the production of records are authorized. (Sec. 202 (b) and (c), *supra,* pp. 2–3.) The records called for were plainly relevant to the investigation and the issuance of a subpoena in aid thereof was clearly proper. *Endicott Johnson Corp.* v. *Perkins, supra.* Petitioner's contention that a subpoena may be used only to obtain evidence for use in a pending proceeding is without merit. *Ibid.*

CONCLUSION

It is respectfully submitted that the petition should be denied.

Respectfully submitted.

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JANUARY 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945